



In the Matter of

Disputes concerning the payment of
prevailing wage rates and overtime
and proper classification by:

Date Issued: MAY 3, 1988

Case No. 84-DBA-79

TOMROB, INC., Prime Contractor

SIERRA CONSTRUCTION COMPANY

Subcontractor

and

Proposed debarment for labor
standards violations by:

TOMROB, INC.

ROBERT R. THOMPSON, President

and

SIERRA CONSTRUCTION COMPANY

JOHN TERRANOVA, Owner

With respect to laborers and
mechanics employed by the subcon-
tractor on U. S. Department of
Housing and Urban Development
Project No. OH-31-1 (Fairfield
Street) Ravenna, Ohio

DECISION AND ORDER OF DISMISSAL OF HEARING

On April 6, 1988, the U.S. Department of Labor filed a Motion for Judgment by Default in this matter. On April 15, 1988, an Order to Show Cause was issued by me which required each of the other parties to demonstrate by April 21, 1988 good cause as to why that Motion should not be granted or as to why this matter should not be dismissed pursuant to the provisions of Federal Rule of Civil Procedure 41(b).

On April 21, 1988, Louis C. Damiani responded on behalf of Tomrob, Inc., and Robert R. Thompson, Sr., to the Order to Show Cause. Mr. Damiani argues very vociferously that the provisions of 29 C.F.R. §18.39(b) authorizing a default judgment are not applicable to this case since his clients have not failed to appear at a hearing. While acknowledging the authority of the Administrative Law Judge, Mr. Damiani contends that the provisions of Federal Rule of Civil Procedure 55(b) are not applicable here since the five factors to be weighed have not been satisfied based upon the

circumstances of this matter. The response received does not address the applicability of the provisions of FRCP 41(b). The response did include an affidavit of Robert R. Thompson, Sr., in which he itemizes prior problems that he has experienced with former legal counsel representing him in this and other related matters. No response to the Order to Show Cause was received from Sierra Construction Company or John Terranova, who was the owner of that company.

The Employment Standards Administration, Wage and Hour Division, directed separate determination letters to Tomrob, Inc. - Prime Contractor; Robert R. Thompson - President; Sierra Construction Company - Subcontractor; and John Terranova - Owner. Those two determination letters were subsequently appealed and hearings were requested by counsel for each of the parties. The Order of Reference was issued as to all four parties on August 23, 1984 and the case was transmitted to the Office of Administrative Law Judges for hearing on August 30, 1984.

On October 1, 1984, E. Earl Thomas, Deputy Chief Judge, issued a Pre-Hearing Order which requires the U.S. Department of Labor (hereinafter DOL) to furnish the prime contractor and subcontractor all of the information pertinent to a determination of the underpayments involved in this case, including the names of the employees involved, the nature of the violations, the amount, the period covered by the contract, the computations of the overtime underpayments, and other data. That information was to have been provided to both contractors and their officers no later than thirty days from the date of the Order. In addition, Judge Thomas ordered that not later than twenty days after service of that response, the prime contractor and the subcontractor were to serve an Answer admitting or denying the particulars furnished and setting forth any matter in defense or justification. In a timely fashion, DOL did comply with that directive and by way of letter dated November 1, 1984, a copy of DOL's response was mailed to this office for association with the formal record. On November 30, 1984, an attorney by the name of James Alexander, Jr., who was representing Tomrob, Inc., requested an extension of time within which to respond. That request was granted by Judge Thomas on January 3, 1985 by extending the time for filing an answer to January 28, 1985. No response to the Pre-Hearing Order was ever received from Sierra Construction Company and/or John Terranova, Owner, nor was an answer ever filed by Tomrob, Inc., and/or Robert R. Thompson, President.

On July 1, 1986, I mailed to all of the parties and the attorneys of record, a NOTICE which advised them that the case had been assigned to me for hearing and provided them my full name and mailing address. Subsequently, on August 6, 1986, I scheduled this case for hearing on October 1, 1986, in Akron, Ohio. Shortly thereafter, DOL requested a postponement because of a conflict in scheduling. I granted the request for postponement on August 27, 1986. That original Notice of Hearing also included a Pre-Hearing Order which advised all of the parties that I anticipated full discovery of all of the facts pertinent to each of the items at issue and, in addition, I expected a full stipulation of all facts which should not reasonably be disputed. That Notice of Hearing also advised the parties that:

Failure to timely comply with this Pre-Hearing Order without good cause may result in the dismissal of the proceeding or the imposition of other appropriate sanctions against the noncomplying party.

On October 17, 1986, I once again issued a Notice of Hearing and Pre-Hearing Order. On that date, the case was scheduled to be heard on November 21, 1986 in Akron, Ohio. The Pre-Hearing Order also directed the parties to submit to the Administrative Law Judge and exchange by mail, a pre-hearing submission containing the following information:

(a) A brief statement of each issue and the parties' position with regard thereto, including the citation of all relevant statutes, regulations, and case law.

(b) The full name and address of each witness the party proposes to call with a short summary of the witness' expected testimony.

(c) A copy of all documents which the party expects to introduce as evidence. Each document must be properly marked for identification, paginated, and a copy served on the other parties.

(d) All preliminary motions and a statement of objections expected to be made to any documents which are included in the administrative file. Each party will have three (3) days from the date of receipt of these materials within which to lodge written objections to any of the proposed testimony, documentary evidence submitted or to the preliminary motions filed. Failure to voice an objection within the three-day period will result in a waiver of all rights with respect to the introduction of any of the materials. Counsel will have 10 days from the date of this Order to lodge objections to any of the Exhibits previously submitted.

Stipulation of Facts. The parties are directed to prepare a written stipulation of all facts which are not in dispute or should not reasonably be in dispute. That stipulation is also to be submitted 10 days prior to the hearing date. It is expected that the computations of the Department of Labor, Compliance Officer, which have been submitted as Government Exhibits 3 and 4 (GX 3, 4), will be fully stipulated to the extent that the parties agree with the hours worked, rate of pay, and amount due each employee or as they agree with any of those individual items.

The Pre-Hearing Order also requested that legible copies be provided and carried the warning that if the parties failed to comply with this Pre-Hearing Order without good cause that it may result in the dismissal of the proceeding, or the exclusion of the testimony of witnesses who were not listed on the witness list. This material was to have been exchanged ten days prior to the scheduled hearing date or November 12, 1986.

The DOL submitted a full response to the Pre-Hearing Order. On November 12, 1986, David R. Harbarger, Esquire, mailed an Entry of Appearance on behalf of Tomrob, Inc., and Robert R. Thompson, Sr., and also mailed a Motion for Postponement of this case. That request for postponement was granted on the same date that it was received, which was November 13, 1986. In the memorandum accompanying the Motion for Postponement, Mr. Harbarger represents that:

... Rest assured that either myself or an attorney associated with this office will be present at the hearing of this matter on behalf of the parties making this request.

You can also be assured that no further requests for continuance will be made. I would only request that I be consulted as to possible convenient hearing dates so that court scheduled conflicts can be avoided...

On January 15, 1988, I had my secretary initiate telephone contacts with the parties for the purpose of arranging a conference call in order to settle upon a mutually agreeable date for the hearing of this case. At that time, it was learned that Mr. Harbarger no longer represented Tomrob, Inc. Mr. Thompson advised this office that he was in the process of obtaining the firm of Alexander and Buchanan to represent him and he was to advise my secretary immediately following his meeting with the firm. Mr. Thompson never did return the phone call to advise of newly retained counsel. Since I was unable to arrange a conference call, on February 10, 1988, I once again issued a Notice of Hearing and Pre-Hearing Order which set this matter for hearing on April 12, 1988, in Canton, Ohio. That Pre-Hearing Order provided the parties over two months advance notice of the scheduled trial date and also ordered them to conduct the usual pre-hearing exchange of information as noted above at least twenty (20) days prior to the hearing date and to execute a Stipulation of Fact. The Stipulation would take into account the computations of the Department of Labor, Compliance Officer, which have been submitted as Government Exhibits to the extent that the parties agree with the hours worked, rate of pay, and amount due each employee, or as they agree, with any of those items individually. Once again, the Pre-Hearing Order contained the standard warning that failure to comply may result in the dismissal of this case or the imposition of other appropriate sanctions.

On February 22, 1988, I received a letter from a Nathaniel Baccus, III, who indicated that his firm no longer represented Tomrob, Inc., and that he was withdrawing his appearance. On March 22, 1988, DOL submitted another identical set of its exhibits which had been "paginated" in compliance with my Pre-Hearing Order. That submission fully complied with the Pre-Hearing Order in that the other data had previously been submitted in response to prior Pre-Hearing Orders and counsel for the DOL advised that he had been unable to arrive at any stipulations. On February 26, 1988, I received a letter from David R. Harbarger advising that he no longer represented Tomrob, Inc.

On March 3, 1988, this office received a telephone call from a Mr. Damiani, who inquired as to the possibility of a continuance and informed my secretary that on March 1, 1988 he had been asked to represent Mr. Thompson in this case. Since I was not in the office at that time, my secretary advised him that his call would be returned the following week. Subsequently, my secretary telephoned the office of Mr. Damiani on both March 8 and March 9, 1988, in an effort to arrange a conference call with all counsel in this matter, but he was not in the office and our calls were not returned. On March 10, 1988, we were advised that Mr. Damiani was out of town and that he would telephone this office upon his return. On April 7, 1988, my secretary received a telephone call from Mr. Damiani and he advised her that he would not be representing Mr. Thompson in this matter. On April 6, 1988, the DOL filed its Motion for Judgment by Default in this case. As had been the case with respect to my prior Pre-Hearing Orders, neither Tomrob, Inc., Robert R. Thompson, President, or Sierra Construction Company and John Terranova, Owner, filed any response whatsoever to the Pre-Hearing Order. Apparently no effort whatsoever was made to stipulate facts in this case even though the vast majority of the Compliance Officer's computations were apparently not genuinely disputed. William A. Peterson, who is counsel for Sierra Construction Company and John Terranova, did submit a single

exhibit which is the affidavit of an individual. That affidavit was sent on March 25, 1988. No explanation was provided as to why the individual could not have been called as a witness in this case, nor did his statement comply in any respect with the requirements of the Pre-Hearing Order.

The procedures governing Davis-Bacon and Related Acts cases are controlled by 29 C.F.R. Part 6, the Rules of Practice and Procedure for Administrative Hearings found at 29 C.F.R. Part 18, and the Federal Rules of Civil Procedure. 29 C.F.R. Part 6.1, 29 C.F.R. Part 18.1(a). The Administrative Law Judge is assigned broad powers in handling case matters. 29 C.F.R. §18.29(a).

These Rules also provide for dismissal of the request for hearing as a result of its abandonment by one of the parties. 29 C.F.R. §18.39(b). I interpret this provision to be akin to Federal Rule of Civil Procedure 41(b), which provides for an involuntary dismissal for the failure of a party to prosecute or to comply with the procedural rules or any order of the court. The Motion for Judgment by Default filed by DOL makes specific reference to Federal Rule of Civil Procedure 55, which authorizes the entry of a default judgment when a defendant fails to answer or otherwise defend his law suit. An Order of Dismissal sua sponte under FRCP 41(b) may be entered by the adjudication officer. Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed. 2d 734 (1962). The key to Rule 41(b) is a finding of a failure to prosecute whether that finding is styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, failure to prepare for conference, or failure to comply with the pre-trial order. Carter v. City of Memphis, Tennessee, CA 6th (1980), 636 F.2d 159, J. F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., CA 7th (1976) 542 F.2d 1318.

The formal record of this case shows that the notification letter from the Administrator which formally advised all of the parties of the alleged liability as determined by the Department of Labor was issued on December 13, 1983. That letter constitutes the Complaint in this case. Thus, this matter has been pending for a period of time in excess of four years. The record contains no evidence that counsel for either the prime contractor or subcontractor engaged in any discovery activity in anticipating the impending litigation.

The October 1, 1984 Pre-Hearing Order entered by Judge E. Earl Thomas was completely ignored by both the prime contractor and subcontractor. The DOL did comply with the Order. Each of the Pre-Hearing Orders which I entered were essentially the same and required the parties to advise me of specific information which I deemed to be essential in conducting an orderly hearing and also in gaining some understanding as to the importance and the nature of the evidence which I would receive. My Pre-Hearing Orders warned the parties very clearly that failure to timely comply without good cause may result in the dismissal of the proceeding. Each of the parties received that warning on three different occasions. Neither the prime contractor nor the subcontractor made any response whatsoever to the Pre-Hearing Order requirements calling for those parties to advise me concerning the issues, the law, and their respective positions involved, witness information, or data pertaining to the documentary evidence which they intended to introduce. Additionally, no Stipulation of Facts was executed nor was one ever discussed. Absent a Stipulation, this type of case necessitates the court hearing testimony concerning the findings made by the compliance officer under circumstances where multiple employees are involved and numerous wage earner records must be considered. A complete

Stipulation of Fact should narrow the issues as to the compliance officer's findings and, therefore, conserve the court's time and expedite the entire hearing process.

Although the subcontractor was granted a postponement following the issuance of the second Notice of Hearing, no relief was requested from the Pre-Hearing Order that accompanied the Notice. Similarly, neither of the parties responded to the third Pre-Hearing Order excepting to the extent that the subcontractor submitted a single affidavit which would not have been received into evidence anyway.

The prime contractor has been completely dilatory in obtaining counsel who would assist him in his case movement. The formal record contains some indication that Mr. Thompson and Tomrob, Inc., discussed representation at varying times by different attorneys, but no meaningful contributions were made by any. On two different occasions, I made an effort to arrange a pre-hearing telephone conference to monitor the progress of the contractors' attorneys in preparing this matter for hearing, but my efforts in that regard were frustrated due to the unavailability of attorneys or their failure to return my telephone calls.

Considering the several warnings which had been provided to the parties in my Pre-Hearing Orders, the fact that the parties and their counsel saw fit to totally disregard the Pre-Hearing Orders and their responsibility to adequately prepare this matter for hearing or to prosecute their claim in some orderly fashion, I conclude that the requests for hearing filed by Tomrob, Inc., Robert R. Thompson, President, and Sierra Construction Company, John Terranova, Owner, should be dismissed as provided by 29 C.F.R. §18.39(b).

In ordering the dismissal of the request for hearing, I am well aware that the courts do not favor the entry of a default judgment. United Coin Meter Co. Inc. v. Seaboard Coastline Railroad, 705 F.2d 839 (1983) . Similarly, the courts have recognized that the dismissal of an action for an attorney's failure to comply with pre-trial orders is a harsh sanction which should be used only in extreme situations where there exists a record of delay or contumacious conduct by the party initiating the action. Carter v. City of Memphis Tennessee, 636 F.2d 159 (1980); Silas v. Sears Roebuck and Company, Inc., 586 F.2d 382 (5th Cir. 1978. No default judgment is being entered here under FRCP 55 and thus the argument made by Mr. Damiani is not relevant to the action being taken. I am dismissing the contractors' request for hearing and that action is to be distinguished from the entry of a judgment against a party whose conduct has caused delay or was contumacious in some form. In this case, it was the contractors who requested the hearing on DOL's wage determination findings. It was the contractors who sought the relief of the Administrative Law Judge from the audit activity of DOL. It was the contractors who caused the delay in making proper payment to the underpaid employees. It was the contractors, by way of their conduct in the prosecution of this matter, that caused the final resolution to be delayed and the determination on the validity of the DOL determinations to be postponed.

Robert R. Thompson and Tomrob, Inc., had ample opportunity, in fact years, to obtain counsel who would meaningfully pursue their hearing request and who would expeditiously prepare this matter for hearing. Mr. Thompson did not seem able to retain counsel for any length of time and

even as late as one day after DOL's Motion for Default was received, this office was advised that Mr. Thompson's current counsel would not be representing him. It apparently was only after the Order to Show Cause was issued that Mr. Thompson concluded that the retention of counsel was in his own best interests.

It was the contractors' request for hearing that these parties have failed to prosecute. I simply do not believe that our procedural rules require that simply because the contractors timely make a request for hearing that the Department of Labor must incur the expense of producing the evidence necessary to sustain its determinations before any resolution can be made of the matter. As a corollary to the last proposition, I also do not believe that it is incumbent upon the Administrative Law Judge to incur the expense for his agency of traveling to the site of the scheduled hearing to determine if one or more of the parties will default. That was essentially Mr. Damiani's contention with respect to the applicability of our own Regulation and FRCP 55. Our Regulations expressly provide that a request for hearing may be dismissed upon its abandonment. This record shows that the contractors and their attorneys wholly failed to comply in any respect with the pre-hearing orders, there was no discovery, settlement discussion, nor was the court apprised in any respects concerning the contractors' intentions with respect to the hearing of this matter. I was frustrated in my efforts to arrange telephone conferences to determine the status of the case. Clearly, the procedural history evidences delay and contumacious conduct on the part of the parties who had requested this hearing. If they have such little regard for the orderly progression of their case, then why should DOL expend its attorney time in defending the determinations and the court be required to expend time and money under circumstances where it is unclear that any of the parties will even appear. In my judgment, Link v. Wabash Railroad Co., supra, clearly authorizes the dismissal of this matter.

Therefore, IT IS ORDERED that the requests for hearing filed by each of the parties to this proceeding are hereby dismissed as being abandoned, and for failure to properly prosecute as provided by 29 C.F.R. §18.39(b) and Federal Rule of Civil Procedure 41(b), and that the determinations made by Herbert J. Cohen, Deputy Administrator, Employment Standards Administration, Wage and Hour Division, by letters dated December 13, 1983 are reinstated in their entirety as if no request for hearing had been made by any party to this proceeding.

RUDOLF L. JANSEN
Administrative Law Judge